**LORENSUS TUKAN**

**v.**

**PUBLIC PROSECUTOR**

SUPREME COURT, KOTA KINABALU
GEORGE SEAH SCJ
MOHD. AZMI SCJ
WAN HAMZAH SCJ
[CRIMINAL APPEAL NO. 21 OF 1985]
10 NOVEMBER 1987

***CRIMINAL LAW AND PROCEDURE:*** *Murder - Defence of grave and sudden provocation by deceased - Exception 1 to s. 300 Penal Code - Test of "grave and sudden provocation" - Whether it is a question of fact to be decided by assessors or question of law to be decided by Judge - Distinction between "trial by Jury" and "trial with aid of assessors" - Whether Judge must properly state reasons for disagreeing with view of assessor on issue of provocation - Misdirection - Whether sufficient ground to justify inference with verdict - Miscarriage of justice - Whether "failure of justice" in s. 422 CPC carries same meaning as "miscarriage of justice" under s. 60 Courts of Judicature Act 1964 - Whether safe to allow conviction of murder to stand.*

This was an appeal by the appellant against his conviction for murder which was passed by the Judge of the High Court, at Labuan, Sabah with the aid of assessors. The appellant relied principally on Exception 1 to s. 300 of the Penal Code, viz, that he committed the offence charged whilst deprived of the power of self-control by grave and sudden provocation given by the deceased, thereby reducing the crime to one of culpable homicide not amounting to murder.

**Held:**

**[1]** Although the Judge is the ultimate determiner of fact and may even in a proper case overrule or disagree with the unanimous or majority views in a trial with the aid of assessors it is quite plain from the provision of s. 198 of the CPC that if the trial Judge so decides, he should give his reason or reasons in his judgment. In this case, the learned Judge had not properly stated his reasons for disagreeing with the view of the 2nd assessor on the issue of provocation.

**[2]** The learned Judge erred when he treated the defence of "grave and sudden" provocation as a matter of law when he should have regarded it as a question which according to law is to be deemed to be a question of fact on the issue whether the facts adduced amounted to grave and sudden provocation to reduce the offence from amounting to murder. Secondly, instead of applying the test of a reasonable man as propounded in *Nanavati* case and which he himself had adopted in his address to the assessors, the learned Judge appeared to use a different test, that of the trial Court. This was a grave misdirection. For what a reasonable man would do in certain circumstances depends upon the customs, manners, way of life, traditional value, etc; i.e. the cultural, social and emotional background of the society to which the accused belongs. Since the learned Judge did not appear to be of the same race as the appellant, it was wrong for him to disregard the test laid down in *Nanavati* case and the opinion of the 2nd assessor, who belongs to the same race as the appellant.

**[3]** However, misdirection is not of itself a sufficient ground to justify interference with the verdict; the Appellate Court must proceed respectively to consider whether the verdict is erroneous owing to the misdirection or whether the misdirection has occasioned a failure of

justice. In deciding whether there has been a failure of justice in consequence of a misdirection the Appellate Court is entitled to take the whole case into consideration and determine for itself whether there has been a failure of justice in the sense that a guilty man has been acquitted or an innocent one convicted. If the Appellate Court so finds, then it has a duty to interfere.

**[4]** At the trial the learned Judge had committed at least three material errors of law. Firstly, he decided as a matter of law whether there was grave and sudden provocation at the time of the commission of the offence charged which according to law was to be deemed question of fact. Secondly, the learned Judge seriously misdirected himself in not adopting the test of a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed, when he considered the defence of provocation in accordance with Exception 1 to s. 300 of the Penal Code. Lastly, he had not properly stated his reasons for rejecting the opinion of the 2nd assessor pursuant to s. 198 of the CPC.

**[5]** Taking all these grave misdirections together, it is impossible to say what verdict or judgment the learned Judge would have given had he properly directed himself on the law. So the appellant ought to be given the benefit of the doubt. In the circumstances, it would not be safe to allow the conviction for murder to stand. The conviction for murder was set aside and substituted therefor a conviction of culpable homicide not amounting to murder.

*[Appeal allowed. Conviction for murder set aside. Substituted conviction of culpable homicide not amounting to murder. Sentenced to 15 years' imprisonment from date of arrest.]*

**Cases referred to:**
*Holmes v. DPP [1946] AC 588*
*Phillips v. The Queen [1969] 2 AC 130*
*Looi Wooi Saik v. PP [1962] MLJ 337*
*Othman Mat v. PP [1964] MLJ 118*
*Kuan Ted Fatt v. PP [1985] CLJ (Rep) 174*
*Kwaku Mensah v. The King [1949] AC 83*
*Nanavati v. State of Maharashtra [1962] AIR SC 602*
*Ramanugrah Singh v. Emperor [1946] AIR PC 153*
*Prasad v. The Queen [1981] 1 All ER 319*
*Mahlikilili v. The King [1943] AIR PC 4*
*Abdul Rahim v. King-Emperor [1945-46] 73 IA 77*
*Elahee Buksh 5 Suth WR 80*

**Legislation referred to:**
Courts of Judicature Act 1964, s. 60
Criminal Procedure Code, ss. 198, 422
Penal Code, s. 300, Exception 1

*For the appellant - Joseph Ambrose Lee; M/s. Lee Yong Chia & Partner*
*For the respondent - Malik bin Haji Ishak, DPP*

**JUDGMENT**

**George Seah SCJ:**

At the conclusion of the hearing we set aside the conviction for murder and substituted it with a conviction of culpable homicide not amounting to murder and sentenced the appellant to imprisonment for a term of fifteen years to commence as from the time of his arrest. We now give our reasons for doing so.

The appellant is an Indonesian/Timorese and was charged with the murder of Timing bin Anjal at the High Court at Labuan, Sabah. He was arrested by the police on 18 August 1982 and two days later he made a confession to a Magistrate. This confession was admitted at the trial without objection by the defence. There was no doubt whatsoever that the appellant caused the death of Timing but in his defence he appeared to rely principally on Exception 1 to s. 300 of the Penal Code, viz that he committed the offence charged whilst deprived of the power of self-control by grave and sudden provocation given by the deceased, thereby reducing the crime to one of culpable homicide not amounting to murder.

At the appeal learned Counsel for the appellant had submitted that the learned Judge had committed material contradictions in dealing with the law on provocation. After explaining Exception 1 to s. 300 of the Penal Code to the assessors in his summing-up the learned Judge said:

> Gentlemen, you will note that not all provocations would reduce the offence of murder to culpable homicide not amounting to murder. In order to have such result the provocation must be grave and sudden so as to deprive a reasonable man of his power of self-control. Whether the provocation was grave and sudden in order to deprive a reasonable man of his power of self-control is a **question of fact** to be decided by you, gentlemen assessors, after considering all the evidence placed before you in this trial.

At p. 3 of his judgment the learned Judge continued:

> As regards whether the accused was deprived of his self-control by grave and sudden provocation when he did the act, the assessors were divided in their opinion. The 1st assessor's answer was in the negative. The 2nd assessor (Timorese) however, was of the opinion that the accused had lost his self-control because of grave and sudden provocation. I agree with the view expressed by the 1st assessor. Though the accused must have been rather upset by the loss of his only saving and was angered by the deceased's refusal to go to the police station and running away, I do not think that these facts taken together and not in isolation can amount to grave and sudden provocation **in law**.

On the one hand, the learned Judge seemed to direct the assessors that whether the provocation was grave and sudden enough to deprive a reasonable man and the appellant of his power of self-control so as to reduce the offence from amounting to murder was a question of fact to be decided by them. And on the other hand, the learned Judge appeared to have determined the matter himself not as a question of fact but as a matter of law. This in our judgment, was a serious misdirection [see *Holmes v. DPP* [1946] AC 588, *Phillips v. The Queen* [1969] 2 AC 130, *Looi Wooi Saik v. PP* [1962] MLJ 337, *Othman Mat v. PP* [1964] MLJ 118 and *Kuan Ted Fatt v. PP* [1985] CLJ (Rep) 174].

In *Holmes* case the House of Lords decided *inter alia*, that it was the function of the trial Judge to make a preliminary ruling on the evidence adduced as to whether or not the provocation was such as **could** provoke a reasonable man to react to it in the way the accused did (see also *Phillips* case at p. 137E). If on the whole of the evidence there is nothing which could entitle a jury to return the lesser verdict the Judge is not bound to leave to the jury to find murder or manslaughter [see *Kwaku Mensah v. The King* [1949] AC 83 at p. 92]. Here after leaving the question, which according to law is to be deemed a question of fact, to be decided by the assessors the learned Judge was wrong to adjudicate the question by treating it as a matter of law. If the learned Judge disagreed with the opinion of the 2nd assessor he should give his reason or reasons for doing so under s. 198 of the Criminal Procedure Code.

Next, learned Counsel for the appellant contended that at the end of his address the learned Judge posed certain questions dealing with issues of fact for the determination of the assessors. One of the questions related to Exception 1 to s. 300 of the Penal Code and it reads:

> Whether the accused committed the acts of slashing Timing bin Anjal whilst deprived of the power of self-control by grave and sudden provocation?

The 1st assessor answered NO but the 2nd assessor replied YES. In his judgment, the learned Judge stated that he accepted the opinion of the 1st assessor and rejected that of the 2nd assessor. This is what the learned Judge said in his judgment:

> Though the accused must have been rather upset by the loss of his only saving and was angered by the deceased's refusal to go to the police station and running away, **I do not think** that these facts together and not in isolation can amount to grave and sudden provocation in law.

The test of "grave and sudden" provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control [see *Nanavati v. State of Maharashtra* [1962] AIR SC 602]. This test has been adopted and applied by the Courts in this country and was in fact used by the learned Judge in his address to the assessors. Although there was no attack at the manner the learned Judge had dealt with the law on provocation in his summing-up to the assessors, but, in our opinion, he had seriously misdirected himself in the application of the law to the facts of the case. In our judgment, the learned Judge erred when he treated it as a matter of law when he should have regarded it as a question which according to law is to be deemed to be a question of fact on the issue whether the facts adduced amounted to grave and sudden provocation to reduce the offence from amounting to murder. Secondly, instead of applying the test of a reasonable man as propounded in *Nanavati* case and which he himself had adopted in his address to the assessors, the learned Judge appeared to use a different test, that of the trial Court. In our judgment, this is a very grave misdirection. For what a reasonable man will do in certain circumstances depends upon the customs, manners, way of life, traditional value, etc. In short, the cultural, social and emotional background of the society to which an accused belongs. Since the learned Judge does not appear to be of the same race as the appellant we think it was wrong for him to disregard the test laid down in *Nanavati case* and the opinion of the 2nd assessor, who belongs to the same race as the appellant. As Lord Goddard correctly observed in *Kwaku Mensah case* at p. 93:

> The tests have to be applied to the ordinary West African villager, and it is on just such questions as these that the knowledge and common sense of a local jury are invaluable.

The learned DPP had argued that there are essential differences between a criminal trial before a jury and one with the aid of assessors. It was submitted that in a jury trial there is a clear demarcation of the functions of the Judge and the jury in that speaking generally the former deals with the law and the latter with the facts. On the other hand, in a trial conducted with the aid of assessors the Judge is the ultimate decider of both the law and the facts, and the function of the assessors is to help the trial Judge in making up his mind as to issues of fact. In giving the judgment of the Privy Council from an appeal in India in the case of *Ramanugrah Singh v. Emperor* [1946] AIR PC dealing with this question Sir John Beaumont said:

> It is clear from these sections of the Code that the Legislature drew a sharp distinction between a trial by jury and a trial with the aid of assessors. A jury, aided by the Judge, is the final tribunal for deciding the facts; assessors merely aid the Judge who decides the facts as well as the law.

The view of Sir John Beaumont is supported by the judgment of Lord Diplock in a recent case decided by the Privy Council in *Prasad v. The Queen* [1981] 1 All ER 319. At p. 321 Lord Diplock said:

> ... There is no jury; the trial is before a Judge and assessors to number of not less than four in capital cases. The Judge sums up to them; each then states his individual opinion as to the guilt of the accused; although permitted to consult with one another they are not obliged to do so; and the ultimate decider of fact (as well as law) is the Judge himself who need not conform to the opinions of the assessors, even though they be unanimous, if he thinks that their opinions are wrong. The field of comment on evidence that is proper to a Judge in summing up to a jury in a trial in which they are collectively the exclusive deciders of fact is not necessarily the same as in summing up to assessors whose function it is to help the Judge in making up his mind as the sole ultimate determiner of fact.

Speaking of a trial conducted with the aid of assessors, Lord Atkin observed that

> this operates, and no doubt is intended to operate, as a safeguard to native accused of crime, and a guarantee to the native population that their own customs and habits of life are not misunderstood" [see *Mahlikilili v. The King* [1943] AIR PC 4].

Although the Judge is the ultimate determiner of fact and may even in a proper case overrule or disagree with the unanimous or majority views in a trial with the aid of assessors, it is quite plain from the provisions of s. 198 of the CPC that if the trial Judge so decides, he should give his reason or reasons in his judgment. At the trial, the learned Judge disagreed with the opinion of the 2nd assessor on the question of provocation and he purported to give his reasons for rejecting it. We have already dealt with this matter in the earlier part of this judgment where we held that the learned Judge misdirected himself in dealing with this question. Having discarded this we are constrained to hold that the learned Judge had not properly stated his reasons for disagreeing with the view of the 2nd assessor on the issue of provocation.

Misdirection is not of itself a sufficient ground to justify interference with the verdict; the appellate Court must proceed respectively to consider whether the verdict is erroneous owing to the misdirection or whether the misdirection has occasioned a failure of justice. If the Court so finds, then it has a duty to interfere. In deciding whether there has been a failure of justice in consequence of a misdirection the appellate Court is entitled to take the whole case into consideration and determine for itself whether there has been a failure of justice in the sense that a guilty man has been acquitted or an innocent one convicted [see *Abdul Rahim v. King-Emperor* [1945-46] 73 IA 77]. In our opinion, the Privy Council did not intend to lay down an exhaustive definition because the phrase "miscarriage of justice" can arise under a variety of circumstances and each case has to be decided on its own particular case. In this connection we are also of the view that the words "failure of justice" in s. 422 Criminal Procedure Code should carry the same meaning as "miscarriage of justice" under the proviso to s. 60 Courts of Judicature Act 1964. That was a case where the appellant, Abdul Rahim was convicted on a charge of murder and sentenced to death after a trial before the Sessions Judge of Ambala, India sitting with a jury of seven. In the course of its judgment the Privy Council made reference to the case of *Elahee Buksh* 5 *Suth*. WR 80. The decision in *Elahee Buksh* case was that of a Full Bench of five Judges of the High Court of Calcutta,

presided over by the learned and experienced Chief Justice, Sir Barnes Peacock. There the appellant was convicted and sentenced to transportation for the crime of dacoity (gang robbery). At the trial the Judge seriously misdirected the jury. The Divisional Bench sought guidance from the Full Bench. The learned Chief Justice in a careful judgment, concurred in by his colleagues, examined in all its bearings the question of the powers and duty of an appellate Court in dealing with an appeal where misdirection has occurred. Sir Barnes Peacock expressed his decision by formulating certain propositions of which the third only may be usefully quoted for the purpose of this appeal:

> 3. That the verdict and conviction ought not to be set aside if the Court be of opinion that the verdict was warranted by the evidence, and that upon that evidence they would have upheld the conviction on appeal if the trial had been by the Judge with the aid of assessors, instead of by jury (see p. 95).

We would adopt the test propounded by Sir Barnes Peacock in *Elahee Buksh* case in determining this appeal.

At the trial the learned Judge had committed at least three material errors of law. Firstly, he decided as a matter of law whether there was grave and sudden provocation at the time of the commission of the offence charged which according to law was to be deemed question of fact. Secondly, he seriously misdirected himself in not adopting the test of a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed, when he considered the defence of provocation in accordance with Exception 1 to s. 300 of the Penal Code. Lastly, he had not properly stated his reasons for rejecting the opinion of the 2nd assessor pursuant to s. 198 of the CPC. *A fortiori*, when the 2nd assessor belongs to the same race as the appellant. Taking all these grave misdirections together, in our judgment, it is impossible to say what verdict or judgment the learned Judge would have given had he properly directed himself on the law. We think the appellant ought to be given the benefit of the doubt. In the circumstances, it would not be safe to allow the conviction for murder to stand. We think this was a proper case for us to follow the course adopted by the Privy Council in *Kwaku Mensah case*, that is to set aside the conviction for murder and substitute therefore a conviction of culpable homicide not amounting to murder. After hearing the submission of mitigation made by learned Counsel for the appellant we sentenced the appellant to a term of imprisonment for a period of fifteen years to commence from the date of his arrest. To that extent, the appeal was allowed.

Also found at [1988] 1 CLJ 143